No. 10-618

Supreme Ct., U.S.
FILED
DEC 9 - 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CITY OF NEW YORK, *et al.*,
Petitioners,

v.

METROPOLITAN TAXICAB BOARD OF TRADE, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF CITY OF CHICAGO, *et al.*, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a local government program that creates an incentive, but contains no mandate, for taxicab owners to purchase alternative-fuel vehicles, which are defined by reference to engine technology and not fuel efficiency, is preempted under 49 U.S.C. § 32919(a), which prohibits local regulations "related to fuel economy standards."

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BRIEF OF CITY OF CHICAGO, *et al.*, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

Amici are local governments across the country and national organizations of local government officials.*

* Pursuant to Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part; and no counsel or party, other than the City of Chicago, made a monetary contribution to fund the preparation or submission of the brief. Pursuant to Rule 37.2, counsel for both petitioners and respondents were notified

All of the local government signatories of this brief – Austin, Boston, Chicago, Dallas, Denver, Houston, Los Angeles, Minneapolis, Nashville, Pittsburgh, Portland, Providence, Salt Lake City, and Seattle – have adopted important environmental programs for their communities. Many of these programs aim to promote sustainability and reduce air pollution. *Amici* therefore have a compelling interest in legal issues affecting local governments and in this case in particular.

The International Municipal Lawyers Association ("IMLA") is a non-profit, professional organization of over 3500 local government entities, including cities, counties, and special district entities, as represented by their chief legal officers, state municipal leagues, and individual attorneys. Since 1935, IMLA has served as a national, and now international, clearinghouse of legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before this Court, the federal courts of appeals, and state supreme and appellate courts.

The National League of Cities ("NLC") is the oldest

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more than 10 days before the due date of the brief or our intent to file this brief; their written consent is submitted with this brief.

and largest organization representing municipal governments throughout the United States. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance. Working in partnership with 49 state municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents.

The United States Conference of Mayors ("USCM") is the official non-partisan organization of all United States cities with populations of 30,000 or more. Members are represented in USCM by their chief elected official, the mayor. USCM's official policy provides that taxi regulators across the country should set fuel-economy and emissions standards for vehicles they regulate. The policy applies to taxicabs and other vehicles operated for hire pursuant to an operating license, permit, or other authorization issued by a state or political subdivision and providing local transportation for a fare determined primarily on the basis of time and/or distance traveled.

This case concerns a claim of preemption directed against a New York City regulation that creates incentives for owners of taxicab medallions to purchase hybrid-electric and clean-diesel taxicabs. The court of appeals relied on an express preemption provision of the Energy Policy and Conservation Act, 49 U.S.C. § 32919(a)(2010)("EPCA"), to invalidate this regulation. This decision was incorrect and should be reversed.

While EPCA's preemption is broad, it does not reach rules that encourage but do not mandate purchase of hybrid or clean-diesel vehicles. Morever, the decision puts at risk numerous other regulatory programs nationwide.

Several other local governments, including Boston, Dallas, and King County, Washington, adopted similar taxicab regulations. Many more are engaged in a variety of creative programs to encourage residents to choose more fuel-efficient vehicles. For example, Salt Lake City provides free parking at city parking meters for low-polluting and fuel-efficient vehicles. See Salt Lake City Code § 12.56.205 (2010). Portland has partnered with local utilities and automobile manufacturers on a federal grant to promote electric vehicles, installing charging infrastructure throughout the region and adopting "electric vehicle" exclusive on-street parking spaces. And Boston formed a partnership with NSTAR Electric and the International Brotherhood of Electrical Workers to encourage plug-in hybrid-electric vehicles. All of these programs, and more, are aimed at reducing our country's over-dependence on fossil fuels, which causes pollution, contributes to climate change, and threatens national security, as EPCA itself makes clear. If not reviewed, the decision below could stifle innovation we can hardly afford to forgo.

This Court has repeatedly recognized that "[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). The court below has halted local experimentation with making taxicabs more energy-efficient. Its decision has already curtailed the enforcement and implementation of similar programs in Minneapolis and Seattle (see *infra* at 28-29) and could affect countless other innovative programs around the country. Because the decision in this case will have a direct effect on matters of substantial importance to *amici* and their members, *amici* submit this brief to assist the Court in determining whether the petition for a writ of *certiorari* should be granted.

INTRODUCTION AND SUMMARY OF ARGUMENT

"[L]ively, diverse, intense cities contain the seeds of their own regeneration, with energy enough to carry over for problems and needs outside themselves." Jane Jacobs, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 448 (Vintage Books 1992). In 2010 and into the foreseeable future, lively, diverse, intense American cities need cars. Although cities work best when their residents, workers, and visitors have various transportation options, cities depend upon cars to move people around. And people moving around, by whatever means, give cities their energy and vitality. Unfortunately, just as modern American cities need cars, cars need energy – copious amounts of energy.

In 2009, the United States consumed 18.7 million barrels of petroleum per day. See U.S. Energy Information Administration, *Annual Energy Review 2009*, DOE/EIA-0384, Figure 5.1 (2010), *available at* http://www.eia.doe.gov/emeu/aer/pdf/aer.pdf. Motor gasoline for the transportation sector accounted for more than 8.8 million barrels, or 47%, of that daily total. See *id.* at Table 5.13c. This energy consumption comes at a cost. The United States spent nearly $199 billion on crude oil imports in 2009, and net imports accounted for almost 52% of United States petroleum consumption that same year. See *id.* at Tables 5.20, 5.7. Recognizing both the pecuniary and non-

pecuniary costs of the Nation's petroleum consumption and importation, Congress enacted EPCA in 1975 to "decrease dependence on foreign imports, enhance national security, achieve the efficient utilization of scarce resources, and guarantee the availability of domestic energy supplies at prices consumers can afford." S. Rep. No. 94-516, at 117 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1956, 1957.

In addition to these energy-related costs, highway vehicles accounted for 50% of United States emissions of carbon monoxide, 32% of nitrogen oxides, and 21% of volatile organic compounds ("VOCs") in 2007 and 2008. See U.S. EPA, National Emissions Inventory Air Pollutant Emissions Trends Data, 1970 - 2008 Average Annual Emissions, *available at* http://www.epa.gov/ttnchie1/trends/. Carbon monoxide reduces the flow of oxygen in the bloodstream and is dangerous to persons with heart disease. U.S. EPA, *Automobile Emissions: An Overview*, EPA 400-F-92-007, 2 (1994), *available at* http://www.epa.gov/oms/consumer/05-autos.pdf. Nitrogen oxides and VOCs are both precursors to the formation of ground-level ozone, which damages the lungs and aggravates respiratory problems, and is, according to the U.S. EPA, "our most widespread and intractable urban air pollution problem." *Ibid.* In addition, as much as half of all cancer caused by outdoor sources of air toxics may be attributed to motor vehicles. See U.S. EPA, *Air Toxics from Motor Vehicles*, EPA 400-F-92-004, 1-2 (1994), *available at*

http://www.epa.gov/otaq/toxics.htm. Moreover, light-duty vehicles (cars and light trucks) account for nearly 20% of United States carbon dioxide emissions. See U.S. EPA, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2008*, EPA 430-R-10-006, 3-12 (2010), *available at* http://www.epa.gov/climatechange/emissions/usinventoryreport.html. As this Court recently found, "U.S. motor-vehicle emissions make a meaningful contribution to [global] greenhouse gas concentrations . . . ." *Massachusetts v. EPA*, 549 U.S. 497, 525 (2007).

Congress did not intend EPCA to preempt efforts by cities to manage their transportation networks, promote energy independence, reduce air pollution, or fight climate change through clean-vehicle incentive programs. The text of EPCA, interpreted in light of this Court's preemption precedents, makes this clear. New York City's particular clean-vehicle incentive program, 35 Rules of the City of New York § 1-78(a)(3) ("Lease Cap Rules" or "Rules"), is a permissible regulation for two reasons. First, the Lease Cap Rules contain a technology-based standard that does not impermissibly relate to the federal fuel-economy standards that are the subject matter of EPCA and its preemption clause. Second, the Lease Cap Rules are an incentive program for taxicab owners and thus do not impermissibly relate to EPCA's fuel-economy program, which prescribes performance standards for manufacturers. The court of appeals improperly

expanded EPCA preemption by misinterpreting its text and failing to heed the presumption against preemption of historic local police powers. This Court has long operated under "the assumption that the historic police powers of the States were not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). And the Court has continued to recognize that this assumption applies "with particular force when Congress has legislated in a field traditionally occupied by the States." *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008) (citation omitted).

Although the federal government has asserted significant authority over interstate transportation, energy, and air quality on a national level, local governments have traditionally exercised substantial authority over their transportation networks and streets. See, *e.g.*, *Buck v. California*, 343 U.S. 99, 102 (1952) (local regulation of taxicabs); *Detroit, Fort Wayne, & Belle Isle Railway v. Osborn*, 189 U.S. 383, 390 (1903) (local order requiring railway to install safety devices); *Karpark Corp. v. Town of Graham*, 99 F. Supp. 124, 128 (D.C.N.C. 1951) (local regulation of parking meters). See also *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 97 (1824) (counsel's list of local licensing laws for stage carriages). This includes local regulations aimed at reducing air pollution from the transportation sector. See, *e.g.*, *Pacific Gas & Electric*

Co. v. Police Court, 251 U.S. 22, 25-26 (1919) (local regulation requiring street railroads to suppress dust is within police power and collecting cases). Consistent with these historic police powers, New York City and other local governments have adopted clean-vehicle incentive programs to increase the efficiency of their transportation networks and promote better air quality. Pet. 25-27. These local incentive programs vary in their content and scope, but such variety and innovation are laudable and should be permissible in our federal system.

Preserving a space for local experimentation benefits not only the governments that pilot original programs but also the Nation as a whole. See, *e.g.*, *Oregon v. Ice*, 129 S. Ct. 711, 719 (2009). Local governments need room to innovate within the federal framework because unique local problems often demand unique local solutions; and if a local solution is found, it is one less problem left for another level of government. Or, local governments across the country may face similar problems, and the programs of one can serve as a source of solutions for others. Either way, the rest of the country reaps the benefits of local innovation while not bearing the costs. There are instances, of course, where local innovations may improperly burden interstate commerce or overly intrude upon federal concerns, but courts are properly reluctant to invalidate on either ground local programs adopted

pursuant to their historic police powers. See *Altria Group*, 129 S. Ct. at 543.

The court below misread the statute and misapplied this Court's precedents. As the petition makes clear, it also created a conflict in the circuits. Pet. 9. From the perspective of the *amici*, the decision's sweeping breadth alone warrants granting the petition. The court of appeals' expansive interpretation of EPCA's preemption provision encourages challenges to other local incentive programs around the country that promote the use of clean, fuel-efficient motor vehicles in American cities and towns. It also chills the development and implementation of future programs by encouraging litigation against them. To address the important issue of EPCA preemption and provide clarity to the courts of appeals, to state and local governments, and to businesses and consumers weighing the short-term benefits of lower-cost, traditional vehicles against the long-term implications for our Nation of continuing our over-dependence on traditional energy sources to power those vehicles, the Court should grant the petition for a writ of *certiorari*.

REASONS FOR GRANTING THE PETITION

I. EPCA SHOULD NOT BE INTERPRETED TO PREEMPT LOCAL CLEAN-VEHICLE INCENTIVE PROGRAMS.

The court of appeals ruled that EPCA preempts even technology-based clean-vehicle incentive programs, like New York City's Lease Cap Rules. The plain language of the preemption provision shows that this is wrong for two reasons. First, the court omitted an important textual limitation on the scope of preemption, which restricts its reach to laws and regulations related to federal annual fuel-economy standards for manufacturers. Second, it ignored the difference between technology-based programs that provide incentives and those that impose mandates.

EPCA preempts local regulations "related to fuel economy standards or average fuel economy standards." 49 U.S.C. § 32919(a). The statute defines "average fuel economy standard" as "a performance standard specifying a minimum level of average fuel economy applicable to a manufacturer in a model year," *id.* § 32901(a)(6), while "fuel economy standard" itself is not defined. Nonetheless, "it is an ancient and sound rule of construction that each word in a statute should, if possible, be given effect." *Crandon v. United States*, 494 U.S. 152, 171 (1990) (Scalia, J., concurring). In violation of this ancient and sound

rule, the court below failed to give effect to the phrase "fuel economy standard" when it interpreted EPCA's preemption clause. As a result, it reached an interpretation far broader than if it had accommodated all the statutory terms.

The court of appeals did not offer a definition of "fuel economy standards," but leapt to the erroneous conclusion that the Rules "are directly related to fuel economy standards" based on the idea that "they rely on fuel economy, and nothing else, as the criterion for determining the applicable lease cap." Pet. App. 11a. This conclusion both misidentifies the preempted subject matter and mischaracterizes the Rules. With respect to the scope of EPCA preemption, EPCA does not preempt local regulation that relies on "fuel economy," but only regulation that relates to "fuel economy standards." The court below simply read the word "standard" out of EPCA's preemption clause. In turn, because the court failed to give effect to a word of limitation, it impermissibly expanded the scope of preemption and swept in local regulation that may relate to "fuel economy" but does not relate to "fuel economy standards" as used in EPCA – namely, as we explain below, federal performance standards directed at manufacturers.

And with respect to the Lease Cap Rules, the court of appeals mischaracterized them by stating that the Rules "rely on fuel economy, and nothing else, as the

criterion" for determining lease rates. The Rules do indeed rely on something else to determine the applicable lease cap – a technology-based criterion that differentiates between hybrid and clean-diesel engines, on the one hand, and traditional gasoline engines on the other. The court incorrectly determined that "'hybrid' is simply a proxy for 'greater fuel efficiency'" and, therefore, that the Rules impermissibly relate to fuel-economy standards. Pet. App. 11a. In support of its conclusion, the court stated that "EPCA specifically requires the separate consideration of 'dual fueled' vehicles, including hybrids, in the determination of national fuel economy standards." *Id.* at 10a. This misses the point. EPCA may require federal regulators to separately consider hybrids in determining fuel-economy standards, but that does not make engine technology a "fuel economy standard." Federal regulators must also consider vehicle weight when they set separate average fuel-economy standards for passenger automobiles and larger commercial vehicles. See 49 U.S.C. § 32902(b). See also *id.* §§ 32901(a)(7), 32901(a)(18), 32901(a)(19) (defining different vehicles classes by weight for purposes of setting separate fuel-economy standards). Nonetheless, neither of these requirements makes local laws based on engine technology or that classify vehicles by weight a "fuel economy standard."[1]

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[1] Weight restrictions are commonplace. See, *e.g.*, *Hager v. City of West Peoria*, 84 F.3d 865, 867 (7th Cir. 1996) (local prohibition of

The court also found the Rules problematic because they are not "neutral to the fuel economy of the vehicles to which they apply." Pet. App. 11a. To be sure, engine technology can affect fuel economy, but a technology-based local incentive program with an effect on fuel economy does not thereby have a prohibited relationship to "fuel economy standards" under EPCA. Many design features of new automobiles affect fuel economy: size, shape, weight, energy-using accessories, and tire type. See National Research Council, *Effectiveness and Impact of Corporate Average Fuel Economy (CAFE) Standards* 31-32, 95 (2002), *available at* http://www.nhtsa.gov/cars/rules/cafe/docs/162944_web.pdf. Thus, mandating taxicabs of a certain size or capacity, for instance, undoubtedly affects a fleet's fuel economy. Under the court of appeals' reading of EPCA, any local taxi regulation or other programs that require or promote certain vehicles based on these or other design features would be preempted because such programs are not fuel-economy neutral.

Although EPCA does not define the term "fuel economy standards," the broader statutory scheme provides a guide to its scope. In order to interpret a statutory term, courts may look to the particular statutory language at issue, as well as "the language and design of the statute as a whole." *K Mart Corp. v.*

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overweight vehicles on certain streets).

Cartier, Inc., 486 U.S. 281, 291 (1988). EPCA refers to "fuel economy standards" in other parts of the statute where, as in the preemption provision itself, that term is used separate from the term "average fuel economy standards." See, *e.g.*, 49 U.S.C. §§ 32902(b)(2)(C), 32902(e)(2), 32902(h)(3), 32902(k)(2), 32902(k)(3). Both these other provisions and the other portion of the preemption clause itself can and should be consulted to determine the scope of local regulation that is preempted because it is "related to fuel economy standards."

These other uses of the same term reveal that "fuel economy standards" means the same thing as "average fuel economy standards," except with the "average" component removed. Thus, "a performance standard specifying a minimum level of average fuel economy applicable to a manufacturer in a model year" becomes the more general "a performance standard specifying fuel economy applicable to a manufacturer in a model year."[2] Framed in this way, it becomes clear that a

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[2] See, *e.g.*, 49 U.S.C. § 32902(b)(2)(C) (Secretary of Transportation "shall prescribe annual fuel economy standard increases that increase the applicable average fuel economy standard"); *id.* § 32902(e)(2) (manufacturers may exclude emergency vehicles "in applying a fuel economy standard under subsection (a), (b), (c), or (d) of this section," concerning Secretary's decisions regarding average fuel-economy standards); *id.* § 32902(h)(3) (factors Secretary may not consider "when prescribing a fuel economy standard" pursuant to subsections (c), (f), and (g), concerning the

local technology-based regulation does not bear a prohibited relationship to the preempted subject matter – the annual fuel-economy performance standards for manufacturers – even if the regulation has an impact on fuel economy. That is because the performance standards mandate a level of compliance for manufacturers, but not any particular engine technology for achieving compliance. Engine technology is just one of many design features that manufacturers may consider in complying with their annual performance standards. Therefore, a local technology-based regulation does not relate to those performance standards such that it is preempted under EPCA.

Not only are the Lease Cap Rules permissible under EPCA because they reflect a technology-based standard and not a miles-per-gallon standard, but they also escape preemption because they are an incentive program rather than a mandate. As this Court has recognized in another preemption context, voluntary incentive programs are "significantly different from command-and-control regulation." *Engine Manufacturers Association v. South Coast Air Quality*

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setting and amendment of average fuel-economy standards); *id.* § 32902(k)(3) (subsection (b)(1)(C) directs Secretary to prescribe average fuel-economy standards for larger commercial vehicles in accordance with subsection (k), and subsection (k) refers to the "work truck fuel economy standard adopted pursuant to this subsection").

Management District, 541 U.S. 246, 258 (2004). This distinction applies with particular force when, as here, the federal statute at issue is intended to subject businesses engaged in interstate commerce to uniform national standards. See, *e.g.*, *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645, 656-57 (1995). This is because local incentives merely act as an "indirect economic influence" on the national market and do not further regulate that market such that the uniformity of the federal scheme is disrupted. See *id.* at 659; *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 519 U.S. 316, 334 (1997) ("We could not hold pre-empted a state law in an area of traditional state regulation based on so tenuous a relation without doing grave violence to our presumption that Congress intended nothing of the sort."). As we explain above, EPCA preempts only local regulations related to the federal fuel-economy standards directed at manufacturers. Thus, by providing an incentive rather than imposing a manufacturing or purchase requirement, the Rules are neither related to EPCA's manufacturer-focused fuel-economy standards, nor do they disrupt its manufacturer-focused program.

II. THE COURT BELOW SHOULD HAVE APPLIED THE PRESUMPTION AGAINST PREEMPTION BECAUSE TAXICAB REGULATIONS ARE AN EXERCISE OF THE HISTORIC POLICE POWERS OF LOCAL GOVERNMENTS.

Were there any doubt about the language of EPCA's preemption clause, the court below erred by not applying the presumption against preemption. "[W]hen the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" *Altria Group*, 129 S. Ct. at 543 (quoting *Bates v. Dow Agrosciences, LLC*, 544 U.S. 431, 449 (2005)). This is a mainstay of this Court's analysis when a claim of preemption is directed against the historic police powers of state and local governments. See, *e.g.*, *Rice*, 331 U.S. at 230. Given this presumption, preemption is proper only when "Congress has made such an intention clear and manifest." *E.g.*, *Bates*, 544 U.S. at 449 (citations and internal quotations omitted). In particular, this Court has cautioned that courts should not take the preemptive phrase "relate to" to the "furthest stretch of indeterminacy, [because] then for all practical purposes pre-emption would never run its course . . . . [T]hat, of course, would be to read Congress's words of limitation as mere sham, and to read the presumption against pre-emption out of the

law whenever Congress speaks to the matter with generality." *Travelers*, 514 U.S. at 655.

Local governments have traditionally regulated their streets and transportation networks in order to protect the general health, safety, and welfare of their citizens. Given this historic local regulatory power and the lack of "clear and manifest" intention on the part of Congress, the court of appeals should have rejected preemption. That result simultaneously honors the text of EPCA's preemption provision, preserves the ability of local governments to regulate their streets and transportation networks, and furthers EPCA's energy-independence and national-security goals.

Local governments manage transportation to promote mobility, efficiency, safety, and air quality. Achieving these goals can be difficult in a complex urban system with many countervailing forces and a multitude of individual and institutional actors, so cities must be creative and flexible as they attempt to align market forces with socially beneficial outcomes. Such balancing is the foundation of the police power and is nowhere more important than in our dense, complex, diverse cities. This Court long ago recognized the importance of the police power for cities:

> [O]perations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building

> with combustible materials, and the burial of the dead, may all . . . be interdicted by law, in the midst of dense masses of population, on the general and rational principle, that every person ought so to use his property as not to injure his neighbors; and that private interests must be made subservient to the general interests of the community.

Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 62 (1872) (internal quotation marks omitted).

Local governments have regulated taxicabs pursuant to their police powers for decades. See, *e.g.*, *Buck*, 343 U.S. at 102. More generally, local regulation and licensing of public transit and conveyances for hire have an even longer history. See, *e.g.*, *Belle Isle Railway*, 189 U.S. at 390 (electric streetcars); *Fanning v. Gregoire*, 57 U.S. (16 How.) 524, 534 (1853) (ferry boats); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) at 203 ("laws for regulating the internal commerce of a state, and those which respect turnpike roads, ferries, etc., . . . remain subject to state legislation"). Local control over the transportation network has long included regulations addressing safety, air quality, and other subjects within the retained police power. See, *e.g.*, *Pacific Gas & Electric*, 251 U.S. at 25-26 (regulating street railways to suppress dust); *Belle Isle Railway*, 189 U.S. at 390 (requiring railway to install safety

devices); *New York, New Haven & Hartford Railroad Co. v. New York*, 165 U.S. 628, 629 (1897) (prohibiting railroads from heating passenger cars with internal stoves or heaters). In addition, local governments have a lengthy history of balancing competing uses of their streets and waterways to enhance the efficiency of their transportation networks and promote public convenience. See, *e.g.*, *Cincinnati, Indianapolis, & Western Railway Co. v. City of Connersville*, 218 U.S. 336, 340-41 (1910); *Escanaba & Lake Michigan Transportation Co. v. City of Chicago*, 107 U.S. 678, 681 (1883); *Gilman v. City of Philadelphia*, 70 U.S. (3 Wall.) 713, 721-22 (1865).

Local governments have adopted clean-taxicab incentive programs to promote air quality and increase the efficiency of their transportation networks. Taxicabs serve a particular purpose in urban networks. Unlike most mass transit trips, taxicabs can go directly from door-to-door (and point-to-point in a multimodal journey). And unlike most private vehicle trips, taxicab service does not require a parking space at either end of the trip, which frees up building and street space for other uses, and can reduce pressure for private car ownership and rentals. See generally Paul S. Dempsey, *Taxi Industry Regulation, Deregulation, & Reregulation: the Paradox of Market Failure*, 24 Transp. L.J. 73, 117-18 (1996). Just as government involvement in mass transit is justified under a public-good theory, public-good and market-failure theories

also support traditional regulation of the taxicab industry. See *id.* at 91-100. Air pollution is one such market failure, or negative externality, that local governments have attempted to address through clean-taxicab incentive programs. See *id.* at 94-96.

In addition, taxicab incentive programs may help reduce the disruptive effects of fluctuating fuel costs on the taxicab market. In an era of volatile fuel prices, a taxicab fleet that relies upon diversified energy sources and maximizes energy efficiency may be better able to perform the unique functions for which urban transportation networks rely on taxi service. New York City adopted its Lease Cap Rules to correct "a structural problem with the standard vehicle lease arrangement that artificially insulated fleet owners from fuel costs" because drivers who lease their vehicles bear the cost of fuel. Pet. 4. And, recognizing the impact that fluctuating fuel costs have on the taxi market, Chicago allows taxi drivers to impose an additional gasoline surcharge on all fares under certain conditions and when gasoline prices exceed a certain threshold. See Municipal Code of Chicago, Ill. § 9-112-510(e) (2010). Regulations of this sort may serve to enhance the stability and efficiency of the taxicab market as a whole by ensuring that the service providers are adequately compensated when fuel prices rise. See Dempsey, *supra*, 24 Transp. L.J. at 111-14 (finding evidence of service deterioration and

inadequate vehicle upkeep when taxicab operators are not adequately compensated).

Local governments also encourage clean-vehicle use by the general public. Local programs include tax incentives, sales rebates, parking incentives, high-occupancy vehicle ("HOV") lane exemptions, and a host of other incentives for fuel-efficient or clean vehicles. Pet. 25-27. Such programs support national energy independence and reduce greenhouse gas emissions. Moreover, clean-vehicle incentive programs help cities improve local air quality. This Court has properly recognized that as a core police power function. See *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960) ("Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power."). Because clean-vehicle incentive programs fall within fields traditionally subject to local regulation, the court below should have applied the presumption against preemption, and determined that the Lease Cap Rules were not preempted.

III. ALLOWING LOCAL GOVERNMENTS TO ADOPT INNOVATIVE CLEAN-VEHICLE INCENTIVE PROGRAMS ADVANCES THE GOALS OF EPCA.

Because Congress has not made its intent to supplant state law clear and manifest, the settled rule is that state and local governments remain free to act "in matters requiring diversity of treatment according to the special requirements of local conditions." *Milk Control Board of Pennsylvania v. Eisenberg Farm Products,* 306 U.S. 346, 351 (1939). And "[o]ne of the commonest forms of state action is the exercise of the police power directed to the control of local conditions and exerted in the interest of the welfare of the state's citizens." *Ibid.* "Some of these subjects call for uniform rules and national legislation; others can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such localities respectively." *Gilman*, 70 U.S. (3 Wall.) at 726-27. In short, unique local conditions often require unique local solutions, and local governments are often in the best position to design and implement such solutions.

The management of local transportation networks requires just this sort of "diversity of treatment" because of local conditions. Population centers vary greatly in their geography, weather conditions, density, built environments, mass transit options, and

transportation patterns. These unique characteristics affect a city's transportation network. For instance, cruising cabs, which drive around searching for pedestrians to hail them, are successful only in larger cities with high population densities. See Dempsey, *supra*, 24 Transp. L.J. at 88. In other cities, a larger percentage of the taxi fleet is radio-dispatched or relies on cabstands at airports or hotels. See *id.* Where cabs regularly cruise, regulators may choose to promote engine technologies that allow easy refueling (like hybrid-electric vehicles that are powered primarily by gasoline or clean diesels, which both can be refueled at neighborhood gas stations). Where particular cabstands are more intensively used, on the other hand, refueling infrastructure at these locations may support more specialized engine technologies like compressed natural gas or full-electric vehicles.

Cities also differ markedly with respect to the air quality impacts of their transportation networks. Salt Lake City and Denver, for example, have temperature inversions during the winter that combine with their unique geographies to greatly increase the likelihood of smog. There also may be more tourists using taxicabs during the winter. And cold weather may prompt residents to shift from mass transit to more energy-intensive modes of travel. Local governments must account for these and other seasonal trends when attempting to reduce overall emissions from their transportation networks. Such local differences

require local solutions, and this variety can be a source of innovation that can benefit the entire country. In addition, local experimentation may help cities maintain or achieve compliance with federal air quality standards when reductions from other sources (stationary, area, and other mobile sources) are not sufficient. Taxicab regulations that provide incentives for emerging clean-engine technologies can be an important part of these efforts.

Beyond this local need for local solutions, EPCA was enacted to "decrease dependence on foreign imports, enhance national security, achieve the efficient utilization of scarce resources, and guarantee the availability of domestic energy supplies at prices consumers can afford." S. Rep. No. 94-516, at 117, *reprinted in* 1975 U.S.C.C.A.N. 1956, 1957. Yet our enormous dependence on automobiles and the energy that fuels them makes it unlikely that we can achieve these goals through federal performance standards alone. Social and economic change in how our cities and towns transport goods and people is also necessary. Because modern American cities require extreme amounts of energy to keep running and they have long had to balance market forces with socially beneficial outcomes, they are the ideal level of government to test, refine, and inspire energy policies that may ultimately meet EPCA's goals. It is difficult to predict what social and economic changes will be most transformative or whether such change on a

national level is even possible, but one thing is clear – we are all poorer when we do not allow our cities to innovate and explore solutions without cost or risk to the country, and only the possibility of gain.

Many local governments are only too happy to be one of Justice Brandeis's laboratories of innovation on this and other intractable problems. In fact, there is a sense of fraternity and friendly rivalry among many American cities. We pay attention to each other's successes not only to replicate them, but also to out-do them. We also pay attention to each other's setbacks to avoid having similar problems. Several national organizations, of which three are *amici* here, facilitate the exchange of information about what works, what does not work, and what can be improved on. But decisions like that of the court below can chill even the most zealous experimenter. This is especially true in tough economic times, when there is particular reluctance to pursue innovative policies with heightened litigation risks. Besides New York City, Boston, Dallas, and King County have also been sued for their clean-vehicle taxi regulations. And on November 19, 2010, the Minneapolis City Council unanimously passed the following resolution:

> [T]he City of Minneapolis, in response to the rulings in the *City of New York* case and related litigation throughout the country, has halted the enforcement of its

> taxicab fuel efficiency ordinance requirements found in Minneapolis Code of Ordinance (M.C.O.) § 341.300, originally adopted in 2006, and has been unable to pursue new regulations aimed at incentivizing the utilization of fuel efficient and environmentally sustainable taxicabs[.]

Resolution 2010R-570, *available at* http://www.ci.minneapolis.mn.us/council/archives/proceedings/2010/20101119-proceedings.pdf. Similarly, Seattle passed an ordinance in 2008 authorizing rules mandating vehicle size, fuel-efficiency, and emissions requirements for new taxicabs, but has not adopted such rules in light of the rulings in this case.

Of course in our federal system, if preemption is warranted based upon a close reading of the relevant statute and applicable precedents, then that is the proper result. But, by the same token, preemption by a judicial decision that is untethered to the statutory language and heedless of this Court's careful limitations on "related to" preemption is inappropriate. Moreover, it is a loss not only to the government involved, but to other cities that cannot replicate, fine-tune, or improve upon the original innovation; and it stifles other programs that might similarly be thought to run afoul of the statute.

The decision below threatens to do just that. The holding is so broad that local governments are hesitant to adopt clean-vehicle incentive programs with any relation, however incidental, to fuel economy. That disabling decision should not stand. At a minimum, before it becomes law, it should be reviewed by this Court.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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December 9, 2010